



In the Supreme Court

OF THE
United States

OCTOBER TERM, 1942

No.

STUART DAGGETT, SR., and AMERICAN
TRUST COMPANY, Executors of the
Last Will and Testament of Estelle
P. Clark, Deceased,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

As we have discussed the cases dealing with alimony trusts, this brief will be confined to four points.

I.

Repeated rulings under the Bankruptcy Act show there is no objection to the husband's agreeing to

make the support payments in any reasonable period fixed by the parties. Death may intervene but the payments agreed to are still support payments.

II.

The creditor-debtor-security arrangement which was created by the contract of February 28, 1906 continued after the death of James F. A. Clark on September 9, 1935.

The continuance of the security arrangement and of the debt is emphasized by the fact that the contract conferred a lien on trust corpus for unpaid income deficiencies.

III.

That the wife waives her contingent dower right does not prevent but rather invites treating the payments as alimony. (In *Douglas v. Willcuts* the wife waived dower.)

The power of appointment was not property and in any event the payments were for support. (In the *Leonard* case, the wife received a power to appoint.)

IV.

The husband remained continually interested in the trust and had a large control over it. The same interest and the same control continued in his estate. The arrangement survived his death.

I.

REPEATED RULINGS UNDER THE BANKRUPTCY ACT SHOW THERE IS NO OBJECTION TO THE HUSBAND'S AGREEING TO MAKE THE SUPPORT PAYMENTS IN ANY REASONABLE PERIOD FIXED BY THE PARTIES. DEATH MAY INTERVENE BUT THE PAYMENTS AGREED TO ARE STILL SUPPORT PAYMENTS.

If the payments which the husband has promised to make to his wife in consideration of his duty to support her happen to fall due *after the wife dies*, the quality of the payments is not erased by the wife's death. Bankruptcy will not discharge the payments.

"The appellant asserts that the contract cannot be regarded as an agreement for the support of the wife because, upon her death, it inures to the benefit of her estate. But, unlike alimony, an agreement intended for support and maintenance need not terminate on the death of the party to be supported and maintained."

D'Andria v. Hageman, 253 App. Div. 518, 2 N. Y. S. (2d) 832, re-argument denied, 254 App. Div. 662, 4 N. Y. S. (2d) 376, affirmed, 278 N. Y. 360, 16 N. E. (2d) 294.

Note that the case marched through every Court of New York.

The following New York case presented an after-death demand for alimony. The issue of discharge in bankruptcy was not directly involved but the Court of Appeals took occasion to say the wife was a creditor and the claim could not have been discharged in bankruptcy. The reference was to the tag end due *after the husband died*.

“The separation agreement was for her maintenance and support. The debt was not dischargeable in bankruptcy. Matter of Ridder, 2 Cir., 79 Fed. 2d 524, 103 A.L.R. 719. As such creditor she was preferred over general legatees and annuitants.”

In re Bloomingdale's Will, 278 N. Y. 435, 17 N. E. (2d) 121, modifying decrees of Appellate Division, 252 App. Div. 563, 300 N. Y. S. 499, reargument denied, 253 App. Div. 798, 1 N. Y. S. (2d) 1015.

These cases are founded on Federal Court rulings which show that in agreeing upon payments to be made to a wife for her support, the parties are not, in fixing times of payment, governed by what a divorce court might order.

Section 17 (U. S. C. Title 11, Sec. 35) of the Bankruptcy Act now *expressly* provides that payments agreed to be made by a husband in consideration of his obligation to support his wife shall not be discharged in bankruptcy. The amendment of February 5, 1903 (32 Stat. at L. 797) merely clarified the law. This is shown in *Wetmore v. Markoe*, 196 U. S. 68, 49 L. ed. 390. The question arose in the Federal Courts as to whether, if these payments are to be made in a period when the payment thereof could not have been required by the Court's decree in a divorce action, they come within the law's favor. We have mentioned the concurring opinion that Judge L. Hand rendered in the *Thomas* case and stated the Judge had in mind

his prior opinion in the bankruptcy case of *In re Adams*, 25 F. (2d) 640. There the husband and wife were residents of New York. They made their separation agreement on October 1, 1920. It provided for maintenance of the wife until she remarried or *until she died*. The husband divorced the wife for her adultery, the decree being entered June 3, 1921. He was later adjudicated a bankrupt. He had quit paying under the agreement in 1923. The wife died in 1925. Suit was filed on the contract. The question was as to whether certain payments due after the default and after the divorce and before the wife died could be called maintenance and were discharged by the husband's bankruptcy. It was admitted that the Court could not and did not award the wife alimony, but the question remained as to whether the husband's liability to support the wife at the time of the pre-divorce agreement was not consideration for the payments involved and whether they were support payments. No question of good faith was involved. It was held:

"The fact that the parties chose to spread their payments over a period which might, if the suit proved successful, pass beyond the time when any such duty would exist presumptively affected the amount. Even so, those that fell due after the divorce *did not lose their character as liabilities for maintenance and support*. They were similar to a provision in a separation settlement *which might defer certain installments until after the death of the wife.*"

In re Adams, 25 F. (2d) 640.

Compare that with the Judge's statement in the *Thomas* case.

The Court then dealt with the uncertainties of such a bargain and refused to hold that such a contract rests on "complaisance". It held that the claim would not be discharged in bankruptcy.

In the following New York case the agreement was not set out but the Court said it was similar to the agreement in the *Adams* case. It was held that the contract to support was not discharged in bankruptcy although the agreement showed that it incidentally settled a suit for alienation of affections, *there being no showing that this affected the amount of the support payments.*

In re Ridder, 79 F. (2d) 524. (Certiorari denied, *Ridder v. Ridder*, 56 S. Ct. 599, 297 U. S. 721, 80 L. ed. 1005.)

The Eighth Circuit explicitly ruled that a note taken in consideration of the husband's obligation to support his wife was not discharged in bankruptcy; the payments were "maintenance" payments.

Blackstock v. Blackstock, 245 F. 249.

In the following case the Court made a like ruling. A note was executed by the husband in consideration of the maintenance duty. *The wife had died.* Before death she had accelerated the due date of the note pursuant to its terms relating to defaults. *Certainly the case shows that the payments to a wife for maintenance need not be continuously proportionate to the*

immediate wants of the wife or to the husband's present ability to pay.

In re Runge, 25 Fed. Supp. 31.

That the quality of these payments as support payments survived the death of the husband is shown by this Court's earlier rulings.

In *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. ed. 1084, the husband was about to sue for a divorce. He promised he would make a contract to provide support for her and the children. She was without fault. She apparently had no counsel. The husband took a divorce decree by default and alimony was not mentioned. Then he made a written agreement to support his wife, which agreement was later amended. *The payments to the wife were to run for her life.* He had a change of heart and went into bankruptcy. He claimed the obligation rested on contract only and that it was not a case of alimony and that the demand was dischargeable. The argument that there was collusion was rejected. It was held that the husband's agreement was valid. The contract contained a clause that the payments should cease if the wife remarried. The Supreme Court found it unnecessary to determine whether this contract was dischargeable in bankruptcy because it was a contract to provide the wife with support. The decision was rendered before *Douglas v. Willcuts*. Nor did the Court answer: Did local divorce law discharge him because the decree failed to mention alimony? It held that because of the provision that payments should terminate if the wife remarried, the value of the contract could not be meas-

ured in bankruptcy; that it was too contingent to be subject to discharge. But the Court made this significant statement:

“The facts appearing in this record do not show a case of any moral delinquency on the part of the wife, and the contract, considering the circumstances, *might possibly be held to take the place of an order or judgment of the court for the payment of the amount*, as in the nature of a decree for alimony. We do not find it necessary, however, to decide that question in this case, because, in any event, we think the contract as to the support of the wife is not of such a nature as to be discharged by a discharge in bankruptcy.”

Dunbar v. Dunbar, 190 U. S. 340, 47 L. ed. 1084 at p. 1090.

In the case of *Wetmore v. Markoe*, 196 U. S. 68, 49 L. ed. 390, it appeared that the wife had in 1892 obtained a New York divorce decree requiring her husband to pay to her for her support \$3000.00 per annum *so long as she should live* and that he should also make payments for the support of the minor children. About \$20,000.00 in arrears had accrued under the judgment when the husband was adjudicated a bankrupt on January 13, 1899. Because of the then existing New York decisions, the decree was treated as an unchangeable alimony decree. On that ground the husband claimed that the judgment was but the equivalent of an ordinary contract; that as the decree became unchangeable, the foundation for it, the duty to support, was to be disregarded; that this duty was

merged in the judgment, that a judgment, while involuntary, but equals a contract debt. Later as is shown in *Helvering v. Leonard*, 310 U. S. 80, 84 L. ed. 1087, it was ruled in New York that an alimony decree was subject to change. But when *Wetmore v. Markoe* was decided, the United States Supreme Court was forced to declare exactly the opposite. But the Court ruled that the amounts payable under the Court's decree were not subject to discharge in bankruptcy. *While they ran for the life of the wife*, there was not the slightest indication that any part of this alimony judgment was dischargeable; that is, that the part of it that would be in effect if the husband died was not dischargeable. It said of the New York cases:

"These cases do not modify the grounds upon which alimony is awarded, and recognize that an alimony decree is a provision for the support of a wife, settled and determined by the judgment of the court."

Wetmore v. Markoe, *supra*.

Note that the Supreme Court did not, as it did in *Dunbar v. Dunbar*, give any consideration at all to the question as to whether an ordinary annuity could be measured and discharged in bankruptcy. It certainly is the law that it is dischargeable. The Court would measure the obligation by tables employed by insurance companies which sell annuities. It would thereby be determined whether the wife would outlive the husband and if she would, the Court might fix the present worth of the part of the payments that would be payable after the death of the husband. It would seem,

that the extent of this part of the debt, the wife would share pro rata in the bankrupt's assets.

After the decision in *Wetmore v. Markoe* it was determined in New York in the case of *Wilson v. Hinman*, 182 N. Y. 408, 75 N. E. 236, 2 L. R. A. (N. S.) 232, that in the event the husband *did not consent to the decree* which would be effective after his death, such part of the decree would be void, but the Court took pains to point out that if the husband consented to the decree, the after-death alimony obligation provided for in the judgment would be unalterable. The Court said:

"It may very well be that by the agreement of the parties alimony might be *awarded in a different form* from that provided for in the statute; that is to say, the parties might agree that a gross sum should be paid as alimony or that an allowance should be made to the wife which would bind the husband's estate after his death. *An agreement of that character would in no way contravene public policy and the performance of it would doubtless be enforceable by the courts.* It is on this ground that the decision in *Storey v. Storey*, 125 Ill. 608, 18 N. E. 329, 1 L.R.A. 320, 8 Am. St. Rep. 417, proceeded."

Wilson v. Hinman, 182 N. Y. 408, 75 N. E. 236, 2 L.R.A. (N. S.) 232.

Such a contract though *for life* was formerly a complete substitute for the Court's action and if made, precluded the making of a decree for support in the divorce action.

Galusha v. Galusha, 116 N. Y. 635, 22 N. E. 1114, 6 L.R.A. 487.

II.

THE CREDITOR-DEBTOR-SECURITY ARRANGEMENT WHICH WAS CREATED BY THE CONTRACT OF FEBRUARY 28, 1906 CONTINUED AFTER THE DEATH OF JAMES F. A. CLARK ON SEPTEMBER 9, 1935.

In the following New York case it was ruled that where the separation agreement contained a provision entitling the husband, in the event of his death, to secure the support payments by setting up a trust in his estate and where the husband did create such a trust by his will, the rights which the wife could assert through this trust were the rights of a creditor.

In re Fuller, 271 N. Y. S. 685, affirmed 242 App. Div. 623, 271 N. Y. S. 1099.

It is familiar practice to allow a remedy to the holder of a contingent liability against an estate. Where the wife holds a husband's contract to provide her with support for life and he dies, the Court impounds so much of the husband's estate as is necessary to meet payments which *may* fall due.

Barnes v. King, 129 App. Div. 192, 113 N. Y. S. 325.

Like practice prevails in California when the claim presented calls for payments that are uncertain in amount.

Joost v. Castel, 33 Cal. App. (2d) 138, 91 Pac. (2d) 172 (hearing denied by Supreme Court).

Dabney v. Dabney, 9 Cal. App. (2d) 665, 51 Pac. (2d) 108.

No civilized jurisdiction cuts off the creditor's rights against the debtor's property because of death. If

there is an existing debt and if under existing probate law there is a means of proving the claim, and the legislature does by a new law so clog the remedy as to make the debt worthless, the law will violate the contract clause. After a debt was created under a law that allowed proof of claim against an estate by affidavit, the legislature of Arkansas passed a law forcing the holder of an estate claim, no matter how petty, to appear in Court and support the same by his oath. This made small claims worthless. The law was held to be invalid. The Court said:

“The legislature certainly does not have the power to cut off all demands against the estate of a deceased person or so to impair the right or clog the remedy as to render it inoperative or valueless.”

Riggs v. Martin, 5 Ark. 506, 41 Am. Dec. 103.

Where proceeds of a life insurance policy are not exempt from execution and such proceeds may under an existing law be reached in the event of the death of the debtor, the legislature cannot as against an existing debt amend the law so as to exempt such insurance monies. A Federal case was cited.

Estate of Heilbron, 14 Wash. 536, 35 L.R.A. 602.

As shown in Restatement of the Law of Trusts (American Law Institute) the wife had a lien here on what the trustee held to the extent necessary to cure the husband's defaults. On that ground also a usual remedy against the husband's property survived. The contract here was continuously executory. The husband and his estate had to supply paying securities for

those that defaulted. We quote from the work referred to.

"252. Covenant by One Beneficiary to Pay Money Into the Trust.

"If one of the beneficiaries of a trust contracts to pay money to the trustee to be held as a part of the trust estate and he fails to make the payment, his beneficial interest is subject to a charge for the amount of the liability.

Comment:

(a) If a person transfers property in trust for himself and another and covenants to pay an additional sum to the trustee to be held upon the same trust, and he fails to make the payment, his interest in the property is subject to a charge for the amount by which he is in default. He is not entitled to receive his share of the trust property without making good the default or without deduction from his share of such amount.

Illustration:

By a separation agreement between A, a husband, and B, his wife, A transfers certain securities to C in trust to pay the income to B for life and on her death to pay the principal to A. By the agreement A covenants to pay \$10,000 within a year to C to be held upon the same trust. A fails to make the payment for four years after it is due. B dies, B's personal representatives are entitled to a charge upon the trust property for the amount of interest by which A is in default."

Restatement of the Law, Trusts, Sec. 252.

In Tentative Draft No. 4, of the article, this section was Section 244. The annotations under said section cited:

In re Weston (1900), 2 Ch. 164.

As shown by the first page of Tentative Draft No. 4, the reporter on the article had 14 advisers, part of them of New York City. (See first page of Draft No. 4.)

In the case cited, the Court said:

"In truth, however, the right in its strictest form, appears to be wider than is admitted by the assignee in bankruptcy; it is that a person entitled to property legally vested in a trustee cannot compel those trustees to hand over the property to him until he has satisfied a debt due to those trustees and arising under the instrument which creates the trust."

In re Weston, 2 Ch. D (1900), pages, 173-174.

By law and by contract, the guarantee remained enforceable. The power of appointment could be surrendered at any time.

Merrell v. Lynch, 13 N. Y. S. (2d) at page 514.

III.

THAT THE WIFE WAIVES HER CONTINGENT DOWER RIGHT DOES NOT PREVENT BUT RATHER INVITES TREATING THE PAYMENTS AS ALIMONY. (IN DOUGLAS v. WILL- CUTS THE WIFE WAIVED DOWER.)

THE POWER OF APPOINTMENT WAS NOT PROPERTY AND IN ANY EVENT THE PAYMENTS WERE FOR SUPPORT. (IN THE LEONARD CASE, THE WIFE RECEIVED A POWER TO APPOINT.)

We have discussed dower and have urged that the fact the wife strips herself of this right or that a property settlement is involved does not affect the character of payments which the parties have agreed are for support. We have mentioned that this point is met by *Douglas v. Willcuts* and by the specific terms of this contract and of a judgment.

The following New York case declared that the New York legislature deemed dower rights uncertain and illusory and that for that reason they in 1929 amended the law so as to require that a wife inherited a share in her husband's estate to the extent the will did not give her that share.

In re Jackson's Will, 31 N. Y. S. (2d) 54.

So dower right, at least in New York, was abolished before the husband died. So if we are to emasculate a simple provision of the contract, we have another question affecting value.

It is elementary that a power to appoint creates no estate in the donee of the power. In the *Fuller* case, the wife was given a power to appoint. (310 U. S. 69.) That did not affect in the slightest the decision as to the character of the weekly payments. There is perhaps some conflict in the law as to what jurisdiction

may govern the exercise of a power to appoint that is granted by the resident of a particular place, but there is no uncertainty whatever in the cases as to whether a power to appoint is property of the donee. It cannot be levied upon. It cannot be sold. Nothing can be realized out of it and if it is exercised, the gift under it is treated as the gift of the donor of the power. The power ordinarily takes effect by relation as of the date of the creation of the power and as a part of the instrument which creates it. The rule against perpetuities ordinarily applied requires that the limitation of suspension of vesting shall be measured from the date of the instrument which creates the power. The exercise of the power by Mrs. Clark's will is under attack. (R. 40.) While the Federal Estate Tax Law does impose a tax in the event a general power of appointment by will is exercised, it is not only early common law but the law as laid down in the decisions of the various states that a power to appoint is not property. This is declared in the following citations:

United States v. Field, 255 U. S. 259, 65 L. ed. 617 at page 620;

Estate of Bowditch, 189 Cal. 377, 380.

"* * * nor does a power of itself give the donee or grantee any interest or estate in the property."

49 *Corpus Juris* 1276.

The general rule that a power to appoint is not property is qualified in England and in some states to this extent: If a general power to will is exercised and the donee leaves debts, the creditors may seize the gift.

Shattuck v. Burrage, 229 Mass. 448, 451, 118 N. E. 889.

That is not the rule in New York.

Cutting v. Cutting, 86 N. Y. 522.

The conclusion simply would not be sensible that granting the power to appoint *increased* the support payments.

IV.

THE HUSBAND REMAINED CONTINUALLY INTERESTED IN THE TRUST AND HAD A LARGE CONTROL OVER IT. THE SAME INTEREST AND THE SAME CONTROL CONTINUED IN HIS ESTATE. THE ARRANGEMENT SURVIVED HIS DEATH.

This point was at no time waived although we stressed the first point. It was stipulated that the changes in the investments in the trust were at the direction of the trustor. (Item 11, R. 41. See Par. Tenth of agreement, R. 53.)

In the following case the husband created a trust which would continue for five years unless the husband or the wife died. It was provided that all income should be for the wife's exclusive benefit and that she should be entitled to all gain from investments of trust income. The husband could pay out the trust income to the wife in his discretion. The husband could control the trust investments and he was given wide discretion in the management of the trust. He reserved the right to the trust corpus. This court held that the trust was the husband's trust for the purpose of the income tax law.

Helvering v. Clifford, 309 U.S. 331, 84 L. ed. 788.

The trust instrument here starts out by saying that the wife is willing "to accept a satisfactory allowance properly secured", etc. (R. 45, mid-page.) Obviously, the main purpose of the agreement was to create a type of a mortgage to serve a purpose of the husband. Securities could be changed only at the instance of the husband although the trustee or the wife had to approve. (Par. Tenth, R. 63.) But the instrument recited that the trustee was in no way responsible for the management of the trust. (Par. Fifteenth, R. 55.) The trustor was to receive annually all income above payments to the wife. (Par. Fourth, Subdiv. (a), R. 48.) Capital gains were his. Except for the fact that the husband granted to the wife a power of appointment, the court should not hesitate to call this trust a mere security device. However, the creating of a trust is not necessary to the creation of a power of appointment. All that is necessary is that there shall be a vested estate to which the power is by some instrument attached. In *Helvering v. Clifford* the wife had an interest in the trust because the entire income was conferred upon her. We contend that the majority of the important features of the trust before the court justifies classing it as the husband's trust; a trust to serve the husband's purpose.

Dated, Berkeley, California,
September 4, 1942.

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